REASONS FOR DENYING THE WRIT

I. The Petition Does Not Present Any Compelling Reason(s) For Granting The Writ Of Certiorari

Supreme Court Rule 10 provides, in relevant part, that "review on a writ of certiorari is not a matter of right, but of judicial discretion" and that "certiorari will be granted only for compelling reasons." Rule 10 further states that such "compelling reasons" may be found to exist where a United States Court of Appeals has rendered a decision that conflicts with a decision of another United States Court of Appeals on the same important matter, the United States Court of Appeals has decided an important federal question in a way that conflicts with the decision by the highest court of a state or where a United States Court of Appeals has decided an important issue of federal law in a way that conflicts with decisions of this Court. Furthermore, Rule 10 states that "[a] petition for writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law."

Dr. Gordon's Petition does not implicate any "compelling reasons" stated in Rule 10(b) for granting certiorari. Although the reasons cited in Rule 10 are not exclusive, this Court has held that it should "be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public, as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the Circuit Courts of Appeal." *Layne & Bowler Corp. v. Western Well Works*, 261 U.S. 387, 43 S. Ct. 422, 67 L. Ed. 712 (1923).

The Third Circuit's determination that Dr. Gordon failed to satisfy the "solicitation" exception to the "professional review action" in the Health Care Quality Improvement Act ("HCQIA"), 42 U.S.C. §§ 11101-11152, does not conflict, especially in light of the record, with this Court's precedent or with any other court of appeals. Moreover, certiorari should be denied when a given legal analysis has not been adequately tested and analyzed by the lower courts. This ensures that the Court's review will benefit from the collective wisdom of those who have considered, for example, the scope of the HCQIA's solicitation exception. Certiorari is particularly inappropriate when, as here, the Third Circuit is the only court of appeals that has considered the scope of the solicitation exception to the definition of a "professional review action."

Likewise, the finding of the District Court and Third Circuit of a vertical relationship between the Hospital and Dr. Gordon, which implicates physician discipline and peer review, is in accord with near unanimous case authority. To the extent that Dr. Gordon contends that this hospital-physician relationship is horizontal, as opposed to vertical, Rule 10 prescribes that a "petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." S. Ct. Rule 10.

Accordingly, the Hospital urges that this Court deny certiorari on all questions presented.

II. The Third Circuit Properly Found That Dr. Gordon's Unreasonably Broad Construction Of The "Solicitation" Exception To The HCQIA Immunity Is Contrary To That Statute's Plain Meaning And Legislative History

Dr. Gordon seeks certiorari on the question of whether, on this record, the solicitation exception to a professional review action under the HCQIA applies. Dr. Gordon contends that the definition of "professional review action" under the HCQIA turns on whether the physician's conduct, from the physician's perspective, was intended to solicit or retain business. This interpretation is not supported by a plain reading of the HCQIA itself or the legislative history.

As the Third Circuit stated, the meaning of a statute must, in the first instance, be "sought in the language in which the act is framed, and if that is plain . . . the sole function of the courts is to enforce it according to its terms." *Gordon v. Lewistown Hospital*, 423 F.3d 184, 205 (3d Cir. 2005) (*quoting Abdul-Akbar v. McKelvie*, 239 F.3d 307, 312 (3d Cir.), *cert. denied*, 533 U.S. 953, 121 S. Ct. 2600, 150 L. Ed. 2d 757 (2001)). The Third Circuit also correctly determined:

> [t]he plain language of the solicitation exception focuses on the basis of the 'action' taken by the professional review body, not on the conduct of the physician precipitating the action – '**an action** is not considered to be based on the competence or professional conduct of a physician **if the action is primarily based** on . . . the physician's fees or the physician's advertising or engaging in other competitive acts intended to solicit or retain business.'

Id., 423 F.3d at 205 (citing 42 U.S.C. § 11151(9)(B)) (emphasis added).

The clause "primarily based on" refers not to the physician's subjective intent, but to the professional review body's basis for the challenged professional review action. Thus, as the Third Circuit concluded, "even when the solicitation exception is in play, immunity will be judged by applying the objective standard regarding whether the Hospital based its actions upon the reasonable belief that they are in furtherance of quality healthcare." *Gordon*, 423 F.3d at 205.[1]

Importantly, Dr. Gordon **did not** challenge the Hospital's presumptive compliance with the § 11112 immunity standards, and thus he has conceded that the "basis" for the Hospital's action was the reasonable belief that it was in furtherance of quality health care, not his self-styled "solicitation" efforts.

Universal precedent applying an objective standard to determine immunity from money damages under 42 U.S.C. § 11112(a) further supports this "reasonable basis" construction. *See, e.g., Brader v. Allegheny Gen. Hosp.*, 167 F.3d 832, 840 (3d Cir. 1999) ("Like other circuits, we have adopted an objective standard of reasonableness in this context.") (cases collected); *see also* H.R. Rep. 99-903 at 10, reprinted at 1986 U.S.C.C.A.N. at 6392-93 (adopting objective standard that a professional review action must

[1] In his Petition, Dr. Gordon repeatedly asserts (incorrectly) that the Third Circuit's standard was that "if a hospital believes that preventing protected conduct by physicians . . . will further quality health care or 'protect patients', a hospital would receive immunity." (Gordon Petition for Cert. at 12). However, as noted above, the Third Circuit's standard was an objective one.

be undertaken in the reasonable belief that it is in furtherance of quality health care and rejecting a "good faith" standard as being capable of being misinterpreted as requiring only a test of the subjective state of mind of the physicians conducting the professional review action).

Under Dr. Gordon's interpretation, a review action would never qualify as a "professional review action" as long as the offending physician subjectively intended, or characterized the unprofessional conduct as a "competitive act." Under Dr. Gordon's interpretation, the solicitation exception would become a license by which an offending physician could, with impunity, bully, badger, and abuse patients, all in the name of "competitive acts." A hospital would be powerless to put a stop to this abusive behavior.

In enacting the HCQIA, Congress sought to improve the quality of health care by encouraging professional self-regulation through immunity protection. 42 U.S.C. § 11101. Holding that a disciplined physician's subjective intent to "solicit" is all that is required to sidestep the immunity of the HCQIA would fundamentally undermine the HCQIA's self-regulatory goal and effectively chill peer review.[2] The Third Circuit shared this concern and correctly concluded:

> The record here establishes that the 1997 revocation of Gordon's Medical-Dental Staff privileges resulted from concern for patient welfare. Gordon's attempts to couch his telephone calls to

[2] Even the HCQIA is no defense against a well-heeled, disciplined physician who seeks vengeance through runaway, bad faith litigation. The District Court found that Dr. Gordon's goal was to bankrupt the Hospital through the relentless prosecution of ruinously expensive litigation. *Gordon*, 423 F.3d at 201 n.12.

> Mrs. Seecora to fit within the parameters of the solicitation exception are disingenuous based on the extensive record before this Court chronicling Gordon's continued inappropriate conduct undertaken to advance his personal agenda to the detriment of patient welfare. To hold otherwise on a record such as this would effectively chill effective peer review by permitting the subject of the peer review process to control the application of HCQIA immunity by couching his or her intentions to fit within the solicitation exception to 'professional review action.'

Gordon, 423 F.3d at 206.

Dr. Gordon's strained interpretation of the HCQIA as providing a total exclusion from HCQIA immunity for harmful and unprofessional conduct dressed up as business solicitation is absurd. Solicitation is no safe haven for abuse.

As the Third Circuit rightly observed:

> if HCQIA immunity hinged on the disruptive physician's subjective intent, every disruptive physician would claim that the unprofessional conduct being reviewed was intended for a competitive purpose in order to invoke the solicitation exception to professional review action.

Gordon, 423 F.3d at 205 n.14. A disruptive physician's self-serving "solicitation" gloss must not be allowed. Otherwise, the solicitation "exception" will swallow the HCQIA immunity "rule."

The Petition should not be granted as to Question Presented No. 1.

III. The Third Circuit Correctly Applied Traditional Rule Of Reason To The Peer Review-Based Conditions Of Reappointment As Opposed To The Per Se Liability Standard Or The Quick Look Doctrine

Dr. Gordon's Petition for a Writ of Certiorari contains a fundamental "disconnect" between its technical antitrust jargon and Dr. Gordon's real world unprofessional conduct. The Petition depicts Dr. Gordon's harassing and intimidating phone calls to vulnerable elderly patients simply as informational output. The Conditions of Reappointment, which were applied in the "vertical" context of peer review, are characterized as a "horizontal" information restraint. Antitrust buzzwords, however, neither mask nor excuse Dr. Gordon's long history of disruptive, abusive and harassing behavior.

Dr. Gordon has also attempted to repackage himself as a consumer champion. However, his sterilized version of the case completely ignores that the Hospital, through its peer review process, took measured, progressive steps over the course of years and in response to repeated complaints from patients. Ironically, the Board revoked the Medical Staff appointment of this self-proclaimed "consumer champion" because many of the alleged beneficiaries of his informational output, elderly cataract patients, complained to the Hospital about Dr. Gordon's rude, invasive and unsolicited telephone calls.

In his Petition, Dr. Gordon attacks the Conditions primarily as a per se or near per se violation of Section One of the Sherman Act. The vertical, peer review-based Conditions, however, cannot be squeezed into the ever narrowing per se or "near per se" niche.

In *Texaco, Inc. v. Dagher*, 2006 U.S. LEXIS 2023 (decided Feb. 28, 2006), this Court further narrowed the already narrow per se liability standard:

> Section 1 of the Sherman Act prohibits "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states." 15 U.S.C. §1. This Court has not taken a literal approach to this language, however. *See, e.g., State Oil Co. v. Khan*, 522 U.S. 3, 10, 118 S. Ct. 275, 139 L. Ed. 2d 199 (1997) ("This Court has long recognized that Congress intended to outlaw only *unreasonable* restraints.") (Emphasis added.) Instead, this Court presumptively applies rule of reason analysis, under which antitrust plaintiffs must demonstrate that a particular contract or combination is in fact unreasonable and anticompetitive before it will be found unlawful. *See, e.g., id.*, at 10-19 (concluding that vertical price-fixing arrangements are subject to the rule of reason, not *per se* liability). *Per se* liability is reserved only for those agreements that are "so plainly anticompetitive that no elaborate study of the industry is needed to establish their illegality." *National Soc. of Professional Engineers v. United States*, 435 U.S. 679, 692, 98 S. Ct. 1355, 55 L. Ed. 2d 637 (1978). Accordingly, "we have expressed reluctance to adopt per se rules . . . 'where the economic impact of certain practices is not immediately obvious.'" *State Oil, supra*, at 10 (quoting *FTC v. Indiana Federation of Dentists*, 476 U.S. 447, 458-459, 106 S. Ct. 2009, 90 L. Ed. 2d 445 (1986)).

Texaco, Inc., 2006 U.S. LEXIS 2023, *7-8.

Texaco, Inc. represents this Court's latest refusal to apply the per se liability standard to challenged conduct. There, Petitioners, Texaco, Inc. and Shell Oil Co., collaborated in a joint venture, Equilon Enterprises, to refine and sell gasoline in the Western United States under the original Texaco and Shell Oil brand names. The Respondents, a class of Texaco and Shell Oil service station owners, alleged that Petitioners engaged in unlawful price fixing when Equilon set a single price for both Texaco and Shell Oil brand gasoline. After Equilon began operations, the service station owners brought suit in district court alleging that, by unifying gasoline prices under two brands, Shell Oil and Texaco had violated the per se rule against price fixing. *See, e.g., Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643, 647, 100 S. Ct. 1925, 64 L. Ed. 2d 580 (1980) (per curiam).

The district court awarded summary judgment in favor of Texaco and Shell Oil. The district court determined that the rule of reason, rather than a per se rule or the quick look doctrine, governed the service station owners' claim, and that, by eschewing rule of reason analysis, the service station owners had failed to raise a triable issue of fact.

The Ninth Circuit reversed, characterizing Shell Oil's and Texaco's litigation defense position as a request for an "exception to the *per se* prohibition on price fixing," and rejecting that request. *Id.* at *6. This Court consolidated and granted Texaco's and Shell Oil's separate certiorari petitions to determine the extent to which the per se rule against price fixing applies to joint ventures. (*Id.*)

Holding that the "pricing decisions of a legitimate joint venture do not fall within the narrow category of

activity that is per se unlawful under § 1 of the Sherman Act," this Court reversed the judgment of the Ninth Circuit:

> As a single entity, a joint venture, like any other firm, must have the discretion to determine the prices of the products that it sells, including the discretion to sell a product under two different brands at a single, unified price. If Equilon's price unification policy is anticompetitive, then respondents should have challenged it pursuant to the rule of reason. . . . But it would be inconsistent with this Court's antitrust precedents to condemn the internal pricing decisions of legitimate joint venture as *per se* unlawful.

(*Id.* at *10, *12) (footnotes omitted).

In a footnote, this Court also rejected the service station owners' alternative contention that Shell Oil and Texaco should be held liable under the quick look doctrine. As this Court observed:

> To be sure, we have applied the quick look doctrine to business activities that are so plainly anticompetitive that courts need undertake only a cursory examination before imposing antitrust liability. *See, California Dental Ass'n v. FTC*, 526 U.S. 756, 770, 119 S. Ct. 1604, 143 L. Ed. 2d 935 (1999). **But for the same reasons that per se liability is unwarranted here, we conclude that petitioners cannot be held liable under the quick look doctrine.**

Texaco, Inc., 2006 U.S. LEXIS 2023, *10 n.3 (emphasis added).

If it is not per se, or near per se, illegal under Section 1 of the Sherman Act for a non-sham joint venture to set

the prices at which it sells its products, a hospital's application and enforcement of conditions of reappointment on a chronically disruptive staff physician, in the vertical context of peer review, is not, based on this Court's precedent, illegal per se or under the quick look doctrine.

In *Texaco, Inc.*, this Court recognized that:

> [a]s a single entity, a joint venture, like any other firm, must have the discretion to determine the prices of the products that it sells, including the discretion to sell a product under two different brands at a single, unified price.

Texaco, Inc., 2006 U.S. LEXIS 2023, *10.

This Court has likewise recognized a "hospital's unquestioned right to exercise some control over the identity and the number of doctors to whom it affords staff privileges." *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 30, 104 S. Ct. 1551, 80 L. Ed. 2d 2 (1984). This real world recognition forms this Court's antitrust analysis.

Using *Hyde* as a starting point, lower courts have almost universally applied the rule of reason test, and eschewed the per se standard or quick look doctrine, when assessing the antitrust bona fides of hospital staffing decisions. *See, e.g., Diaz v. Farley*, 215 F.3d 1175, 1184 (10th Cir. 2000) ("Finally, the fact that the conduct at issue in this case concerns decisions relating to health care presents a further reason why we should be cautious in applying a per se test. Because agreements pertaining to the provision of health care services often raise issues of professional medical judgment, it is typically useful to apply a rule of reason approach. . . ."); *Betkerur v. Aultman Hospital Ass'n*, 78 F.3d 1079, 1093 (6th Cir. 1996) ("Indeed, Courts have generally concluded that the rule of reason

applies to practices based on medical considerations."); *BCB Anesthesia Care, Ltd. v. Passavant Memorial Area Hosp. Ass'n*, 36 F.3d 664, 667 (7th Cir. 1994) ("This case involves one hospital's decisions about staff privileges and staffing patterns. The cases involving staffing at a single hospital are legion. Hundreds, perhaps thousands of pages in West publications are devoted to the issues those circumstances present. Those cases invariably analyze those circumstances under the rule of reason – there is nothing obviously anticompetitive about a hospital choosing one staffing pattern over another or in restricting the staffing to some rather than many, or all. . . . A hospital has an unquestioned right to exercise some control over the identity and number to whom it accords staff privileges. . . . Malpractice concerns, quality of care, market perceptions, cost, and administrative considerations may all impact those decisions.") (case citations omitted); *Flegel v. Christian Hospital*, 4 F.3d 682, 686 (8th Cir. 1993) ("The courts of appeals have generally examined the denial or revocation of hospital privileges under the rule of reason. . . ."); *Lie v. St. Joseph Hosp.*, 964 F.2d 567, 570 (6th Cir. 1992) (applying rule of reason to a claimed agreement to suspend a physician's surgical privileges); *Capital Imaging Associates v. Mohawk Valley Medical Associates*, 996 F.2d 537; 545 (2d Cir. 1993), *cert. denied*, 510 U.S. 947, 114 S. Ct. 388, 126 L. Ed. 2d 337 (1993) (applying rule of reason to a radiology group's exclusion from providing services to patients of an HMO); *Kiepfer v. Beller*, 944 F.2d 1213, 1221 (5th Cir. 1991) (applying rule of reason to a physician's claim that he was the target of a campaign by two other physicians to discourage referrals to him).

Commentators and case law are in accord:

> Allegations of a concerted refusal to deal arise frequently in the health care industry. Denial of hospital staff privileges is frequently alleged to be the product of a group boycott organized by competing health care providers. In such cases, the courts have generally applied the rule of reason, holding that a hospital must be allowed, in conjunction with its medical staff, to exclude individual doctors on the basis of their lack of professional competence or unprofessional conduct. Actions to enforce ethical rules by medical associations are also frequently alleged to constitute a group boycott. Again, the courts generally apply the rule of reason, examining whether the rules serve a legitimate purpose in establishing professional standards of care without unduly limiting competition among providers.

ABA Section of Antitrust Law, Antitrust Law Developments 118 (4th Ed. 1997) (citations omitted). The rule of reason governs challenges to peer review-based staffing decisions.

The Conditions also were drafted, applied and enforced in the vertical context of hospital peer review of a disruptive physician. The Third Circuit did not "err" in viewing the peer review relationship between the Hospital and Dr. Gordon as vertical rather than horizontal despite Dr. Gordon's self-proclaimed designation as a "potential competitor." Dr. Gordon, again, is plain wrong.

In *Business Electronics Corp. v. Sharp Electronics Corp.*, 485 U.S. 717, 108 S. Ct. 1515, 99 L. Ed. 2d 808 (1988), this Court ruled that "[r]estraints imposed by agreement between competitors have traditionally been denominated

as horizontal restraints, and those imposed by agreement between firms at different levels of distribution as vertical restraints." *Sharp*, 485 U.S. at 730 (footnote omitted). Both as a matter of law, and on this record, the alleged "restraints" at issue, the Conditions, are the product of a vertical relationship between the Hospital and its peer review of a chronically disruptive member of its Medical Staff. Dr. Gordon, as the District Court and Third Circuit both determined, was not in the role of a "competitor," whether actual or potential (except in his own mind), when the Conditions were imposed. Rather, the Conditions were applied in the context of Dr. Gordon's reappointment to the Hospital Medical Staff. An arrangement like this could not be any more vertical. Courts almost invariably view relationships between hospitals and their staff physicians as vertical. *See, e.g., Coffey v. Healthtrust, Inc.*, 955 F.2d 1388, 1392 (10th Cir. 1992) ("Any relationship which existed between the physicians and [Edmond Memorial Hospital, Inc.] . . . is vertical.").

The Conditions were agreed to in the course of Dr. Gordon's biennial reappointment to the Hospital's Medical Staff. This is quintessentially a vertical relationship. Both vertical price and non-price agreements are subject to the rule of reason. *Sharp*, 485 U.S. at 735-36 (rule of reason applicable to vertical non-price restraints); *State Oil Co.*, 522 U.S. at 10-19) (vertical price-fixing arrangements subject to rule of reason, not per se liability). Assuming the Conditions constitute a "restraint," they constitute a non-price vertical restraint and are subject to rule of reason analysis.[3]

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[3] Dr. Gordon's self-described status as a "potential competitor" is a canard. The District Court did not find that Dr. Gordon and the Hospital were competitors w[illegible]n, in November 1996, Dr. Gordon agreed

(Continued on following page)

For the same reasons that per se liability is unwarranted here, the Hospital is not liable under the quick look doctrine. *Texaco, Inc.*, 2006 U.S. LEXIS 2023, *10 n.3. In *California Dental Ass'n v. FTC*, 526 U.S. 756, 119 S. Ct. 1604, 143 L. Ed. 2d 935 (1999) ("CDA"), this Court instructed the lower courts to apply a quick look rule of reason analysis only when an observer with even a rudimentary understanding of economics could conclude that the arrangement in question would have an anticompetitive effect on customers and markets. *CDA*, 526 U.S. at 770.

In *CDA*, however, this Court rejected the quick look analysis for a horizontal restraint involving a near total suppression of price and quality consumer information among 75% of all dentists in California. It is simply incredible for Dr. Gordon to argue in favor of a quick look at a non-price vertical restraint between one hospital and a single physician – a hospital that sought to protect elderly patients from the "restrained" physician's bullying, harassing and intimidating phone calls. The Hospital imposed the Conditions to protect elderly patients, not gain market share.

This Court therefore should deny the Petition as to Questions Presented Nos. 2 and 3.

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to the Conditions of his reappointment to the Medical Staff. Dr. Gordon did not begin competing against the Hospital until after his privileges were revoked and his Surgi Center opened almost a year later. Dr. Gordon agreed to the Conditions as a member of the Hospital's Medical Staff seeking reappointment, not as a competitor.

CONCLUSION

For the reasons set forth above, the Lewistown Hospital respectfully requests that the Petition for a Writ of Certiorari be denied.

Respectfully submitted,

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FILED
MAR 2 1 2006
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 05-1000

In The
Supreme Court of the United States

ALAN D. GORDON, M.D.; ALAN D. GORDON, M.D., P.C., A CORPORATION; MIFFLIN COUNTY COMMUNITY SURGICAL CENTER, INC., A CORPORATION,

Petitioners,

v.

LEWISTOWN HOSPITAL,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

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REPLY TO COUNTERSTATEMENT

Lewistown Hospital's Brief In Opposition to the Petition for Writ of Certiorari ("Hospital Opposition") consists almost entirely of vituperative personal attacks on Dr. Gordon in which the Hospital claims that on some prior occasions Dr. Gordon acted unprofessionally and in a disruptive manner.[1] At issue in this case, however, is whether it is anticompetitive for a hospital to impose by agreement an information restraint that limits the content of truthful physician-patient communications concerning the comparative risks and benefits of different surgical procedures.

Nowhere in its Opposition does the Hospital specifically address the information restraints or even try to explain how its agreement, that restrains the content of a physician's truthful comparative information concerning different procedures that the physician may communicate to patients, is anything but anticompetitive. Instead, the Hospital seeks to shift the focus of this case to whether it was appropriate for the Hospital to insist that Dr. Gordon

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[1] The Hospital's personal attacks against Dr. Gordon are not supported by the record, were not tested through the litigation process below, and are not relevant to the matters before the Court. The Hospital had repeatedly made accusations in internal Hospital hearings in which it relied entirely on hearsay statements by persons who did not testify, and who Dr. Gordon was prohibited from contacting. Before trial, the district court ruled that the truth of the Hospital's accusations and the consequent internal findings of Hospital hearings would not be admitted for their truth, and barred Petitioners from challenging them. The district court, however, reversed its pre-trial evidentiary rulings a year and a half after trial (App. at 231), and then based its judgment almost entirely on the very facts it had barred the parties from litigating (simultaneously preventing motions for reconsideration). The Third Circuit, in an extensive footnote, addressed only the hearsay objection and concluded, erroneously, that the district court had discretion to admit hearsay for the truth of the matter asserted. App. at pp. 51-2, n.21.

agree to the information restraints because of the alleged complaints the Hospital received from several consumers.[2] The alleged complaints did not challenge the veracity of the information Dr. Gordon provided. Indeed, the Hospital has never claimed that Dr. Gordon gave patients information that was false or misleading. Accordingly, the Hospital's alleged justification (Dr. Gordon's purported bad conduct) does not support the content-based information restraints. Without such support, the information restraints are nothing more than blatant limitations on competition. *See, National Collegiate Athletic Ass'n v. Board of Regents of The University of Oklahoma*, 468 U.S. 85, 119 (1984) (restraints must be narrowly tailored to serve procompetitive goals). A hospital may not gag important comparative treatment information and hence impair competition because the hospital can point to a few consumers who dislike the information. *See, National Society of Professional Engineers v. U.S.*, 435 U.S. 679, 693-95 (1978) (defendant could not justify a restraint on the ground that competition will injure consumers).

The healthcare ramifications of this case are important. Both the Third Circuit and the district court held that Dr. Gordon is an excellent surgeon, that he offered patients a safer and less invasive surgical procedure than his competitor and that his competitor misled patients concerning the type of procedure he used. Indeed, the district court held that the procedure used by Dr. Gordon was the preferred procedure for removing cataracts by the mid-1990s. The Third Circuit and the district court nonetheless held that a hospital's efforts to prevent a superior

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[2] The only evidence at trial of a complaining patient was Mrs. Seecora who testified by deposition that the information Dr. Gordon gave her made her feel that she had made the wrong decision having Dr. Nancollas treat her. App. at 28.

surgeon from competing by giving patients comparative information about the "preferred procedure" and the older procedure is only subject to the most deferential antitrust scrutiny and that a hospital's efforts to enforce such a restraint is entitled to immunity from damage claims.

That is why the medical community is up in arms over the decision below, and many of its most prominent organizations seek to file *amicus* briefs supporting the Petition. Healthcare markets cannot function efficiently if patients cannot receive information informing them about treatment alternatives and information showing which of those alternatives is the "preferred procedure." Information restraints that prevent physicians from giving patients such information will only lessen competition between physicians and will insulate outdated and less efficient treatment methods from competition. Such restraints will also permit hospitals to limit the ability of physicians who need hospital privileges to open competing outpatient surgery centers.

The facts that are relevant to the legal issues here could not more plainly frame the importance of these issues. Dr. Gordon was promoting to his patients what was recognized as the superior treatment method and had taken significant steps to open an outpatient surgery center when the Hospital made him agree to the information restraints. Consequently, this case presents a critical opportunity for this Court to clarify and explain the type of antitrust analysis such information restraints should receive.

REASONS FOR GRANTING THE PETITION

I. The Hospital Misstates The Legal Issue Under HCQIA.

The Hospital's response is to set up a "straw man" issue under the Healthcare Quality Improvement Act ("HCQIA"). Without citation, the Hospital claims that Dr. Gordon's position is that the relevant statutory carve-out

from the definition of a "professional review action" turns on "whether the physician's conduct, from the physician's perspective, was intended to solicit or retain business." Hospital Opposition, p. 8. This is a red herring. Petitioners maintain simply that the statute means what it says – that a hospital has no HCQIA protection (and must therefore defend its actions on the merits) if the hospital's action is "primarily based on . . . [a physician's] advertising or engaging in other competitive acts intended to solicit or retain business."

It is undisputed that the Hospital primarily based its exclusion of Dr. Gordon on his call to a patient, Mrs. Seecora, which was a "competitive act intended to solicit or retain business." Both the Hospital and Mrs. Seecora interpreted Dr. Gordon's call as an effort by Dr. Gordon to solicit or retain Mrs. Seecora as a patient. (A9002-9005). Indeed, the district court found, as a matter of fact after trial, that Mrs. Seecora "felt that Dr. Gordon was trying to solicit her to use him to remove her remaining cataract." App. at 75. Thus, this case does not present the circumstance where a physician disingenuously and "subjectively" characterizes his conduct as competitive to avoid immunity, as the Hospital argues repeatedly. The conversation for which Dr. Gordon was expelled was unquestionably competitive conduct to solicit or retain business, conduct that falls squarely within the competitive act carve-out from HCQIA immunity. 42 U.S.C. § 11151(9)(B).

The HCQIA issue actually framed by the Petition – which the Hospital ignores – is whether a hospital has statutory immunity whenever it reasonably believes that its action against a doctor is "in furtherance of quality healthcare," even if its action is based on a physician's advertising or other competitive acts. The words of the statute provide that hospital actions based on physician advertising or other competitive acts are not entitled to immunity, regardless of the hospital's belief, even good faith belief. The Third Circuit held to the contrary: "even when the solicitation exception is in play, immunity will be

judged by applying the objective standard regarding whether the Hospital based its actions upon the reasonable belief that they are in furtherance of quality healthcare." App. at 31-32. That is wrong, as explained in the Petition, and in the separate *amicus* briefs of the American Osteopathic Association and the American Association of Ambulatory Surgery Centers. It confuses and combines the separate statutory requirements of 42 U.S.C. § 11151(9) with those of 42 U.S.C. § 11112(a), and it creates an alternative definition for a "professional review action" found nowhere in the statutory definition.

The Third Circuit was the first court of appeals to interpret the statutory carve-outs from immunity. By nullifying the carve-outs and substantially broadening immunity from damages (leading to the corresponding denial of a jury trial), the Third Circuit's decision will deter future challengers, leaving this error to stand long into the future. That is why healthcare organizations representing potential competitors of hospitals – osteopaths, ophthalmologists and ambulatory surgery centers, for instance – have asked this Court to hear this case to correct the Third Circuit's immunity decision before any more damage is done.

II. The Hospital's Antitrust Analysis – Like The Third Circuit's – Relies On Labels And Categorization Inconsistent With This Court's Decisions.

The Hospital Opposition fails to address the substance of Petitioners' antitrust arguments. The Hospital addresses the antitrust issues by: (1) continuing its personal attacks against Dr. Gordon, (2) falsely claiming that Petitioners have argued that the information restraints are subject to *per se* condemnation, (3) erroneously claiming that this Court's decision in *Texaco, Inc. v. Dagher*, 2006 U.S. LEXIS 2023 (Feb. 28, 2006) requires full-blown rule of reason treatment of the information restraints at issue here, and (4) claiming that, regardless of the nature of the restraint or the actual economic reality underlying

the physician-hospital relationship, courts must characterize the physician-hospital relationship as always vertical and subject to deferential treatment under Section One of the Sherman Act.

First, the Hospital suggests this Court should ignore "technical antitrust jargon" and simply focus on Dr. Gordon's alleged "real world unprofessional conduct." Hospital Opposition, pp. 12, 19, 20. The complained-of conduct, however, was not that Dr. Gordon gave patients false or misleading information. Therefore, the Hospital has not and could not present a plausible claim that the information restraints, which directly restrained the content of truthful comparative information, were procompetitive. *See, supra*, pp. 1-2.

Second, the Hospital claims that Petitioners seek to have the information restraints condemned as *per se* unlawful. Hospital Opposition, p. 12. The Hospital's argument is frivolous because Petitioners did not claim in their Petition that the information restraints were subject to *per se* condemnation. Indeed, Petitioners did not present a *per se* theory to either the district court or the Third Circuit.

Third, this Court's decision in *Texaco, Inc. v. Dagher*, 2006 U.S. LEXIS 2023 (Feb. 28, 2006) has no relevance to this case. In *Dagher* this Court held that "it would be inconsistent with this Court's antitrust precedents to condemn the internal pricing decisions of a legitimate joint venture as *per se* unlawful" or to apply the "quick look doctrine." *Id.*, at p. *10. How courts should review the pricing decisions of lawful integrated joint ventures has no relevance to the level of antitrust scrutiny that should be given to an information restraint a hospital imposes by agreement on a physician or a potential competitor.

Finally, the Hospital apparently claims that quick look analysis is never applicable to restraints entered into by hospitals and physicians because physicians and hospitals are vertically related and the full-blown rule of reason test is the only one applicable to vertical restraints.

Hospital Opposition, pp. 16-20. The cases cited by the Hospital do not support such a sweeping statement and the Hospital does not dispute the economic analysis of the physician-hospital relationship presented in the Petition. For example, the Hospital cites *Business Electronics v. Sharp Electronics Corp.*, 485 U.S. 717 (1988) to support its argument that physician-hospital relationships are vertical. In *Sharp*, however, this Court stated that restraints are vertical when "firms at different levels of distribution" enter into agreements. The Hospital, however, has not identified any "distribution" relationship between the Hospital and Dr. Gordon that would make *Sharp* relevant here.

The only physician-hospital case the Hospital cites to support its claim that physician-hospital relationships are always vertical is *Coffey v. Healthtrust, Inc.*, 955 F.2d 1388 (10th Cir. 1992). The court in *Coffey*, however, did not make a general holding concerning the nature of all physician-hospital relationships. Instead, the court, with no analysis, held that the relationship between the plaintiff physicians and the defendant hospital were vertical. *Coffey*, however, involved an exclusive contract for radiology services. A contractual relationship whereby a hospital procures radiology services for its patients is significantly different from a hospital contract that restrains an ophthalmologist from providing information to his or her patients.

The Hospital's second mistake is its argument that a quick look analysis is completely different from the type of analysis used under the rule of reason. Several holdings by this Court and by courts of appeals have "steadily moved away from the dichotomous approach – under which every restraint of trade is either unlawful *per se* . . . or subject to a full blown rule of reason analysis." *Polygram Holding, Inc. v. FTC*, 416 F.3d 29, 34 (D.C. Cir. 2005). In *FTC v. Indiana Federation of Dentists*, 476 U.S. 447 (1986), and

California Dental Association v. FTC, 526 U.S. 756 (1999) this Court held that labels and pigeon holes cannot substitute for careful economic analysis. As this Court directed in *California Dental*, courts are supposed to perform a rule of reason analysis that is "meet for the case." 586 U.S. at 781. The D.C. Circuit accepted that direction, and recently described the law as follows: "the extent of the inquiry is tailored to the suspect conduct in each particular case." *Polygram Holding*, 416 F.3d at 34. Accordingly, the Hospital's claim that the information restraints are subject to the rule of reason, while it states the obvious, does not address the correct issue. The actual issue is the level of scrutiny the information restraints will receive under the rule of reason.

The only effort the Hospital makes to address that issue comes at the very end of its brief where it argues that an abbreviated rule of reason analysis is not appropriate here because in *California Dental* "this Court rejected the quick look analysis for a horizontal restraint involving a near total suppression of price and quality consumer information. . . ." Hospital Opposition, p. 20. This mischaracterizes the Court's opinion, which merely found that the Ninth Circuit had taken too quick a look at ethical rules that were "designed to avoid false or deceptive advertising" and that could well have had "a net procompetitive effect." *California Dental Ass'n v. FTC*, 526 U.S. at 771. Indeed, even in *California Dental*, this Court did not require a full rule of reason market analysis. Then, on remand, the Ninth Circuit held that the CDA's restraints were anticompetitive; however, because of the possible procompetitive benefits, the Federal Trade Commission needed to present some empirical evidence that the restraints had a net-anticompetitive effect. *California Dental Ass'n v. FTC*, 224 F.3d 942, 949 (9th Cir. 2000).

Here the information restraints, imposed on a potential competitor, barred entirely truthful and nondeceptive